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No. 04-557

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

MICHAEL R. CUENCA,

Petitioner,

v.

UNIVERSITY OF KANSAS,
MYRON A. KAUTSCH,
JAMES K. GENTRY,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

BRIEF IN OPPOSITION

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TABLE OF CONTENTS

Page

Table of Cited Authorities iii

Statement of Facts 1

A. Kautsch's Consideration of Non-Reappointment of Cuenca. 2

B. Suspension of University EEO Internal Investigation. 2

C. Professor Frederickson's Comment on Cuenca's Lawsuit. 3

D. Cuenca's Formal Tenure Review. 3

1. The First Review in 1999-2000. 3

2. Cuenca's Second Review 2000-2001. .. 4

E. External Tenure Reviewer Hoy's Comments. 5

F. Defendants' Counsel's Statement. 5

Reasons for Denying the Petition 6

1. The issues presented are not important enough to warrant review because the Tenth Circuit decision on which petitioner seeks certiorari is unpublished, is not precedent, is limited to its unique facts, and will not impact any litigant other than petitioner. 6

Contents

Page

2. Neither the decision below nor the record raises the questions presented in the petition. 7

Conclusion 9

TABLE OF CITED AUTHORITIES

Page

Case

Dessert Palace Inc. v. Costa, 539 U.S. 90 (2003) .. 6, 7

United States Constitution

Seventh Amendment 7

Statute

Section 107 of the 1991 Civil Rights Act 6

Rule

10th Cir. R. 36.3 6

Respondents University of Kansas, Myron Kautsch, and James Gentry respectfully request that the Court deny the issuance of a petition for a writ of certiorari seeking review of the judgment and opinion of the United States Court of Appeals for the Tenth Circuit entered on July 28, 2004, that granted panel rehearing for the limited purpose of modifying its June 15, 2004, order and judgment as noted in the order. The Tenth Circuit's decision was not published.

STATEMENT OF FACTS

This race discrimination and retaliation claim arises out of a failed bid for academic tenure at the University of Kansas ("University') by Michael Cuenca, who began his employment at the University in August 1994 as a tenure-track Assistant Professor of Visual Communications in the Journalism School ("J-School"). Cuenca was denied tenure by the University in March 2000, and advised that his appointment for the 2000-2001 academic year was a terminal appointment.

Myron Kautsch ("Kautsch"), Dean of the J-School, hired Cuenca. Kautsch resigned as Dean in June 1997, and he was succeeded by James Gentry ("Gentry"), who became Dean in July 1997.

In his lawsuit alleging race discrimination and retaliation by the University, Kautsch, and Gentry, Cuenca alleged that six statements made over seven years by four individuals and defendants' counsel constituted evidence of discriminatory and retaliatory animus. The facts surrounding those allegations are outlined below.

A. Kautsch's Consideration of Non-reappointment of Cuenca.

As a faculty member in the J-School, Cuenca was expected to teach, conduct research, and provide service to the J-School, the University, and his profession. Cuenca, like other J-School faculty, was expected to participate in the development of courses and curriculum, serve on committees, and work toward improved technology in teaching communications. Specifically, Cuenca was to teach classes about print and graphic communication, and accomplish scholarly research and creative activity.

During September and October 1995, Cuenca sent three letters to several faculty members complaining of his teaching load. At Kautsch's request, Cuenca wrote a self-evaluation. In this self-evaluation, Cuenca outlined his performance and attacked the J-School administration for not recognizing his record of accomplishments.

Kautsch acknowledged that he considered not reappointing Cuenca because Cuenca was "making demands and stating expectations that cannot be met because they exceed the School's budgetary capacity and are inconsistent with the duties he was hired to perform."

B. Suspension of University EEO Internal Investigation.

Sometime prior to February 17, 1997, Cuenca met with Maurice Bryan, the University's Director of Equal Opportunity, to discuss his displeasure with Kautsch's treatment of him. Cuenca wrote Bryan advising him that he was filing a discrimination complaint with the Kansas Human Rights Commission ("KHRC") against the J-School and

the University based on his "mistreatment since [his] employment." Bryan sent Kautsch a copy of Cuenca's letter, requested a response, and indicated his intent to conduct an investigation of the complaint. Kautsch provided a written response.

Sometime in April 1997, Cuenca filed his EEOC and KHRC complaint charging the University with racial discrimination and retaliation. Thereafter, Bryan advised Kautsch that he had received confirmation that the KHRC had scheduled the complaint for mediation, and he was suspending the internal investigation for that reason. In June 1998, the Kansas Human Rights Commission issued its finding of "no probable cause," and closed Cuenca's complaint

C. Professor Frederickson's Comment on Cuenca's Lawsuit.

After Cuenca filed his discrimination lawsuit, Professor Ted Frederickson made statements to the student newspaper defending Kautsch and Gentry. Professor Frederickson dismissed Cuenca's assertion of discriminatory motivation as "an unvarnished falsehood and an unwarranted attack" on the Journalism School.

D. Cuenca's Formal Tenure Review.

1. The First Review in 1999-2000.

Cuenca was advised by Gentry on April 28, 1999, that he would be going through the promotion and tenure process the following academic year. Cuenca provided Gentry with a draft of his record. Gentry forwarded a selection of Cuenca's

materials to the selected external reviewers from six other universities, two of whom had been selected by Cuenca. When Gentry was advised he had omitted copies of Cuenca's book chapters, he forwarded those to the reviewers with a letter.

Four of the six external reviewers who considered Cuenca's materials recommended against tenure. On November 14, 1999, Cuenca was advised that the J-School Promotion and Tenure Committee decided, twelve votes to two, not to recommend him for tenure. In assessing Cuenca, the committee rated his teaching as "good," his research as "poor," and his service as "poor." Gentry concurred with the committee's recommendation against tenure. The question of Cuenca's tenure was forwarded to the University Committee on Promotion and Tenure, which also recommended against Cuenca's tenure. Cuenca, one of eight individuals denied tenure that year, was advised that his appointment for 2000-2001 would be a terminal appointment.

2. Cuenca's Second Review 2000-2001.

In September 2000, Cuenca requested a second review for promotion and tenure. In this second review, two of the external reviewers recommended against tenure, two recommended for tenure, and a fifth reviewer gave a mixed recommendation.

The J-School Promotion and Tenure Committee, in a twelve to one vote, recommended against tenure. Gentry concurred in the J-School Promotion and Tenure Committee's recommendation against tenure and forwarded the matter on to the University Committee on Promotion and Tenure for its consideration. The University Committee on Promotion

and Tenure again recommended against tenure, and Cuenca was advised his appointment would end in May 2001.

E. External Tenure Reviewer Hoy's Comments.

Frank Hoy was an outside tenure reviewer chosen by Cuenca to consider his tenure materials. Hoy, in his review of Cuenca's tenure materials, criticized Cuenca for "bring[ing] up a minority issue" in his statement of teaching philosophy. Further, Hoy warned that "the information contained in Cuenca's own voluntary statements can be taken as a forewarning of future attitude, perhaps even problems" if Cuenca were granted tenure. Hoy, as an outside reviewer, was not a member of the University's promotion and tenure committees that ultimately recommended denying tenure.

F. Defendants' Counsel's Statement.

In defendants' memorandum in opposition to Cuenca's motion for summary judgment, counsel for defendants argued that "[a]t worst, [Cuenca] has shown Kautsch and Gentry as supervisors who were often frustrated by [Cuenca's] lack of collegiality, unprofessional behavior, and unwarranted personal attacks on students, colleagues, the Journalism School, the University of Kansas or others. The evidence also showed that [Cuenca] often wrote inflammatory correspondence to others."

REASONS FOR DENYING THE PETITION

1. The issues presented are not important enough to warrant review because the Tenth Circuit decision on which petitioner seeks certiorari is unpublished, is not precedent, is limited to its unique facts, and will not impact any litigant other than petitioner.

The Tenth Circuit decision on which petitioner seeks certiorari is an unpublished decision, and is therefore not binding precedent. *See* 10th Cir. R. 36.3. *See Petition, Appendix C* p. 65. The fact that the decision is unpublished underscores its lack of importance and mitigates in favor of denying certiorari.

Petitioner, in his first question presented, argues that the Court should grant certiorari "to clarify for the lower courts whether evidence of illegal intent presented under Section 107 precludes Rule 56 dismissal, whether *Desert Palace* abrogates or alters *McDonnell Douglas*, and whether satisfaction of Section 107 establishes liability." *See Petition* p. 5.

Petitioner attempts to couch this question in terms meriting certiorari by suggesting that the lower courts need guidance to resolve a conflict in the application of the Court's decision in *Desert Palace, Inc. v. Costa*, 539 U.S. 90 (2003). *See Petition* p. 9-10. However, the decisions cited by petitioner do not show a conflict between the Circuits. Instead, the majority of the opinions cited by petitioner are either unpublished or are district court decisions. Moreover, contrary to the *pro se* petitioner's assertion, the decisions are not in conflict either with the Tenth Circuit's unpublished decision in this case or the Court's *Desert Palace* decision.

Petitioner's mistaken assertion of a conflict stems from the *pro se* petitioner's disagreement with the conclusion reached by the Tenth Circuit in evaluating his evidence, and his lack of understanding of the principles it applied in reaching its decision. Thus, petitioner's petition does not present a unique question of law for review. Rather, it is a common, ordinary appeal that does not merit certiorari.

Contrary to *pro se* petitioner's assertion, the Tenth Circuit's opinion makes clear that it used a mixed-motive analysis to review the district court's decision, and that it correctly applied this Court's holding in *Desert Palace, Inc. v. Costa*. In so doing, it concluded that Cuenca failed to provide either direct or circumstantial evidence of discrimination and thus affirmed the district court's grant of summary judgment to the defendants. *See Petition, Appendix C* p. 71-76. The decision of the district court granting defendants summary judgment, and the appellate court's affirmance of that decision, were correct. The question presented by petitioner is not sufficiently important to warrant this Court's attention.

2. Neither the decision below nor the record raises the questions presented in the petition.

Petitioner's question two, in summary, asks to what degree can a court consider the reasonableness of a Title VII plaintiff's protected opposition in determining the merits of the claim on a motion for summary judgment. Petitioner's question three, in summary, asks what constitutes an adverse employment action sufficient to state a Title VII claim. And, petitioner's question four asks whether granting summary judgment on a Title VII claim violates a plaintiff's Seventh Amendment right to trial. None of these questions were raised below by petitioner nor were they addressed in the Tenth Circuit's decision.

Petitioner's question two erroneously asserts that the Tenth Circuit made some determination concerning the reasonableness of petitioner's protected opposition. But, that is a blatant misstatement of the Tenth Circuit's decision. As noted earlier, the Tenth Circuit, using a mixed-motive analysis, determined that petitioner had failed to produce any direct or circumstantial evidence of discrimination or retaliation, and therefore affirmed the district court's grant of summary judgment to the defendants. *See Petition, Appendix C* p. 71-76.

Question three regarding what constitutes an adverse employment action was never addressed by the Tenth Circuit because it was conceded that a denial of tenure resulting in termination of employment was an adverse employment action. Thus, petitioner seeks an impermissible advisory opinion.

Petitioner's question four asserting that the grant of summary judgment to the defendants deprived him of his Seventh Amendment right to trial is a veiled attempt to re-litigate the merits of the Tenth Circuit's decision affirming the district court's grant of summary judgment to the defendants. The Tenth Circuit fully considered and correctly decided the case.

CONCLUSION

For these reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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